

Argued by
JOHN CALDWELL MYERS.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 126.

WILLIAM HENRY PACKARD,

Appellant,

— against —

JOAB H. BANTON, as District Attorney, in and for the
County of New York, and CHARLES D. NEWTON, as
Attorney General for the State of New York,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR APPELLEE JOAB H. BANTON,
as District Attorney, etc.**

JOHN CALDWELL MYERS,
Solicitor for Appellee Joab H. Banton,
as District Attorney, etc.

JOHN CALDWELL MYERS,
FELIX C. BENVENGA,
Of Counsel.

November, 1923.



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WILLIAM HENRY PACKARD,
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against

JOAB H. BANTON, as District At-
torney in and for the County
of New York, and CHARLES D.
NEWTON, as Attorney General
for the State of New York,
Appellees.

No. 126

BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

Statement.

This is an appeal from a decree or order of the District Court of the United States for the Southern District of New York, entered on July 17th, 1922, denying a motion for an injunction *pendente lite* and dismissing the bill of complaint for want of equity. (Tr. 10.) The Court was constituted of three Judges, under the provisions of §266 of the Federal Judicial Code.

The Appellant brought a bill in equity to restrain the District Attorney of the County of New York and the Attorney General of the State of New York from enforcing the penal provisions of Chapter 612 of the Laws of 1922 of the State of New York (Highway Law, §282 B).

That statute provides that every firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle—except street cars and motor vehicles operated under a franchise by a corporation subject to the provisions of the Public Service Commission Law—over, upon or along any public street, in a city of the first class, shall deposit and file with the State Tax Commission, for each motor vehicle intended to be so operated, either a personal bond, or a corporate surety bond or a policy of insurance in the sum of \$2,500, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to person or property “caused in the operation or the defective construction of such motor vehicle”—such bond or policy of insurance to contain a provision for a continuing liability thereunder, notwithstanding any recovery thereon.

The statute further provides that any person, firm, association or corporation operating a motor vehicle in a city of the first class as to which a bond or policy of insurance is required by the statute, who or which shall operate such vehicle, or cause the same to be operated without such a bond or policy approved by the State Tax Commission, as required by the statute, being on file

with the Tax Commission, shall be guilty of a misdemeanor.

The statute applies only to the operation of motor vehicles in the cities of New York, Buffalo and Rochester, as those are the only cities of the first class.

The injunction against the enforcement of the statute was sought on the alleged ground that the statute is unconstitutional.

It is alleged that the statute makes an arbitrary classification and is unreasonable and unequal in its operation and, therefore, denies equal protection of the law to the appellant and to persons similarly situated—*i. e.*, persons engaged in operating taxicabs for hire in the City of New York; and that it is confiscatory and would deprive appellant of his property without due process of law, in violation of the 14th Amendment to the Constitution of the United States and in contravention of Article 1, §6, of the Constitution of the State of New York.

The District Attorney of New York County, and the Attorney General of the State of New York, were made parties defendants for the purpose of bringing the case within the provisions of §266 of the Federal Judicial Code.

The Bill of Complaint.

The allegations of the appellant's complaint are, in substance, as follows:

1. The jurisdiction of the District Court is invoked under Clause "A", Subdivision 1, of §24 of the Federal Judicial Code, the rights of the plaintiff being predicated upon and arising under the 14th Amendment to the Constitution of the United States, as will hereinafter appear, and the sum and value of the controversy exceeding, exclusive of interest and cost, \$3,000.

2. The plaintiff is and has been engaged in the taxicab business, to-wit, carrying and transporting passengers upon and along the public streets in Greater New York for hire, operating 4 cars, and has in all respects complied with the provisions of the city ordinance and the laws of the State of New York regulating the business of taxicabs for hire.

3. The General Assembly of the State of New York has enacted Chapter 612 of the Laws of 1922, entitled "An Act to amend the Highway Law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in cities of the first class;" and the text of the amending statute is set out.

4. The classification made by the statute is arbitrary, unreasonable, and unequal in its operation, and, therefore, denies the plaintiff and all other persons similarly situated the equal protection of the law, in violation of the 14th Amendment of the Constitution of the United States and in contravention of

Article 1, §6, of the Constitution of the State of New York. (The reasons for this contention are averred, but will not be set out here, as they will be discussed in the portion of this brief dealing with the questions of law involved.)

5. The income from the operation of a taxicab in the City of New York is limited by reason of the fact that a rate of fare is fixed by law, and a greater rate cannot be collected. The average net income from the operation of a single taxicab in the city of New York is about \$35.00 per week. Since the passage of the statute, the Insurance Companies operating in the State of New York have fixed a rate of premium at \$960. for the furnishing of a bond required under the statute, which amounts to about \$18.50 per week. The practical result of the administration of the law will be to cut the income of the plaintiff from \$35. per week to about \$16.50 per week on each car operated by him. Plaintiff, therefore, charges that the law is confiscatory and will deprive him of his property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

6. The defendants, as the law enforcing officers of the State of New York, intend to enforce the provisions of the statute and have announced that they will prosecute the plaintiff and all other persons similarly situated if the said law is not complied with; and the plaintiff believes defendants will do so unless restrained by an injunction.

7. The plaintiff is without an adequate remedy at law.

The prayer for relief is that the statute be declared unconstitutional and that the defendants be restrained and enjoined from enforcing the statute against the plaintiff and all other persons similarly situated.

The Motion to Dismiss.

The defendant, Joab H. Banton, as District Attorney, etc., made a motion to dismiss the Bill of Complaint for the following reasons and upon the following grounds:

1. That no sufficient facts are averred in the bill of complaint to show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.

2. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

3. That it appears upon the face of the bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

4. That it does not appear upon the face of the bill of complaint and no sufficient facts are averred therein to show that the intervention of a court of equity or the assumption of jurisdiction by such a court is necessary or essential in order effectually to protect the property or rights of property of the complaint from great and irreparable injury or from any injury whatsoever.

5. That Chapter 612 of the Laws of 1922 is a valid statute duly passed by the Legislature of the State of New York in the due exercise of its lawful and constitutional powers; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of

New York by and through its governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

6. That it appears upon the face of the bill of complaint that to grant the relief sought by the complaint would constitute an unlawful and unconstitutional interference by the agencies of the Federal Government with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of a criminal statute of the State of New York.

7. That it appears upon the face of the bill of complaint that this court [The District Court of the United States for the Southern District of New York] is without power or authority to grant the relief or to render the judgment and decree prayed for.

8. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

The Statute.

The statute under consideration reads as follows:

Chapter 612.

AN ACT

To amend the highway law, in requiring indemnity bonds or insurance policies from owners of motor vehicles transporting passengers for hire in the cities of the first class.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter thirty of the laws of nineteen hundred and nine, entitled "An Act relating to highways, constituting chapter twenty-five of the consolidated laws," is hereby amended by inserting therein a new section, to be section two hundred and eighty-two-b, to read as follows:

§282-b. Indemnity bonds or insurance policies of the first class. Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle, except street cars, and motor vehicles operated under a franchise by a corporation subject to the provisions of the public service commission law over, upon or along any public street in a city of the first class shall deposit and file with the state tax commission for each motor vehicle intended to be so operated, either a personal

bond, with at least two sureties approved by the state tax commission, a corporate surety bond or a policy of insurance in a solvent and responsible company authorized to do business in the state, approved by the state tax commission, in the sum of two thousand five hundred dollars, conditioned for the payment of any judgment recovered against such person, firm, association or corporation for death or for injury to persons or property caused in the operation or the defective construction of such motor vehicle. Such bond or policy of insurance shall contain a provision for a continuing liability thereunder notwithstanding any recovery thereon. If at any time, in the judgment of the state tax commission, such bond or policy is not sufficient for any cause, the commission may require the owner of such motor vehicle to replace such bond or policy with another approved by the commission. Upon the acceptance of a bond or policy, pursuant to this section, the state tax commission shall issue to the owner of such motor vehicle a certificate describing such vehicle and that the owner thereof has filed a bond, or policy, as the case may be, required by this section. Either a personal or corporate surety upon a bond filed pursuant to this section or an insurance company whose policy has been so filed, may file a notice in the office of the state tax commission that upon the expiration of twenty days from such filing such surety will cease to be liable upon such bond, or in the case of such insurance company, that upon the expiration of such time such policy will be canceled. The state tax commission shall thereupon notify the owner of such motor vehicle of the filing of such notice, and unless such owner shall file a new bond or policy of an insurance company, as provided by this section, within such

time as shall be specified by the state tax commission, such owner shall cease to operate or cause such motor vehicle to be operated, in such city, and the registration of such motor vehicle shall be automatically revoked. Any person, firm, association or corporation, operating a motor vehicle in a city of the first class, as to which a bond or policy of insurance is required by this section who or which shall operate such vehicle, or cause the same to be operated, which such a bond or policy, approved by the state tax commission as required by this section, is not on file with the tax commission, shall be guilty of a misdemeanor.

§2. This act shall take effect July first, nineteen hundred and twenty-two.

POINT I.

It is not sufficiently shown that the amount in controversy exceeds \$3,000.

The bill of complaint alleges (Tr. 2) that the jurisdiction of this court is invoked under Clause A, subdivision 1, of §24 of the Federal Judicial Code. This being so, two things must concur in order to give the District Court jurisdiction; namely, (1) there must be a question arising under the Constitution or laws of the United States, and (2) the matter in controversy must exceed, exclusive of interest and costs, the sum or value of \$3,000. (*Marcus Brown Holding Co. v. Pollak*, 272 Fed. 137).

The paragraph of the bill of complaint numbered "First" (Tr. 2) alleges the bare conclusion that the sum or value in controversy exceeds, exclusive of interest and costs, \$3,000. The only facts alleged to show the amount in controversy are set out in the paragraph of the bill of complaint numbered "Fifth" (Tr. 5), which paragraph reads as follows:

"Fifth: Your orator further avers that the income from the operation of a motor vehicle, such as a taxicab, in the City of New York, is limited by reason of the fact that a rate of fare is fixed by law and a greater rate cannot be collected; that the average net income from the operation of a single taxicab in the City of New York is about \$35.00 per week; that since the passage of said Act, the insurance companies operating in the State of New York have fixed a rate of premium at \$960.00 for the furnishing of a bond required under said Act, which amounts to about \$18.50 per week. Accordingly, your orator avers that the practical result of the administration of said law will be to cut the income of your orator from \$35.00 per week to about \$16.50 per week on each car operated by him, and your orator therefore charges that the law is confiscatory and will deprive your orator of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

We submit that the foregoing allegations are wholly insufficient to show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 and, therefore, are insufficient to confer jurisdiction upon the District Court to entertain the suit. It will be ob-

served that it is merely alleged that the insurance companies operating in the State of New York have fixed a premium of \$960—apparently an annual premium—for the furnishing of the bond required under the statute. There is no allegation as to the premium or cost of a *policy of insurance*.

The statute gives the owners of motor vehicles covered by the law the option of three methods of securing the payment of judgments recovered for death or injury caused by the operation or the defective construction of the vehicles; namely, (1) a personal bond, (2) a corporate surety bond and (3) a policy of insurance of a solvent and responsible company authorized to do business in the State of New York. The complainant alleges the cost to him of adopting one of these methods—the furnishing of a corporate surety bond. There is no allegation showing the cost of a policy of insurance and there is no allegation that the plaintiff cannot furnish the personal bond permitted by the statute.

It is true that in an affidavit verified on June 22nd, 1922, and served upon the defendant Banton after he had served his motion to dismiss the complaint, the plaintiff states that he has neither friends nor relatives who would be able or willing to qualify as individual bondsmen.

Even though affidavits verified and served after the verification and service of the bill of complaint can be resorted to for the purpose of supplying omissions or defects in the allegations in the bill, the affidavit of June 22nd, 1922, is still insufficient, for the reason that it does not allege the

cost of obtaining the policy of insurance permitted by the statute. That cost might be considerably less than the alleged cost of \$960 per year for a corporate surety bond. Indeed, it appears from affidavits submitted in behalf of defendants that insurance may be obtained for \$540 per year (Tr. 27); and that corporate surety bonds may be obtained at rates ranging from \$5 to \$25 per car per month, depending upon the amount of collateral deposited with the surety company (Tr. 23, 24).

Furthermore, there is no allegation as to the amount which the plaintiff, in the absence of the statute requiring the giving of a bond or the taking out of a policy of insurance, has set aside in the past or would set aside in the future as a reserve for the purpose of satisfying judgments which might be recovered against him because of injuries arising out of the operation of his taxicabs. Sound business policy requires that a person conducting a business such as the plaintiff's should anticipate the possibility, if not the probability, of the occurrence of accidents in the operation of his taxicabs, and that he should provide for this contingency by setting aside a fund annually which should be used for the purpose of satisfying proper claims against him for injuries inflicted. The amount which the plaintiff might reasonably be expected to be compelled to pay each year in satisfaction of legitimate claims against him should be deducted from the alleged amount of the annual premium for the corporate surety bond, in order to ascertain the real amount involved—the amount in controversy being merely the additional expense, if any, devolved upon the plaintiff by reason of the operation of the statute.

We submit that while the dismissal in the District Court was for want of equity, the bill could have been dismissed for want of jurisdiction, and that therefore the decree of dismissal should be affirmed, without regard to whether the statute attacked in the suit is valid.

POINT II.

The appellant has a plain, adequate and complete remedy at law.

We take it to be a self-evident proposition that a court of equity will not enjoin the enforcement of a criminal statute unless it is clearly shown that the complainant is entitled to relief by injunction. And we take it to be equally self-evident that a Federal court will not interfere with the enforcement by a State of a criminal statute which the State has enacted for the protection of its own citizens, unless a case is made out which convinces the court that it is its duty so to interfere.

This Court has said:

“Courts are reluctant to interfere with the laws of a state or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunal prevented or anticipated unless the necessity for either be demonstrated.” *Grand Trunk R. R. Co. v. Michigan R. R. Commission*, 231 U. S. 457, 465-466.

In *Ex parte Young* (209 U. S. 123, 166, 167, the Court said:

"No injunction ought to be granted unless in a case reasonably free from doubt. We think such a rule is, and will be, followed by the judges of the Federal courts."

In *Cruikshank v. Bidwell* (176 U. S. 73, 80), it was said:

"It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against the proceedings in compliance therewith but it must appear that he has no adequate remedy by the ordinary processes of law or that the case falls under some recognized head of equity jurisdiction."

In *Cavanaugh v. Looney* (248 U. S. 453, 456), the Court said:

"But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young*, supra, 166. The jurisdiction should be exercised only where intervention is essential in order to protect property rights against injuries otherwise irremediable."

The complainant must show that the statute is unconstitutional, that the injunction is essential to the safeguarding of property rights (*Traax v. Raich*, 239 U. S. 33-38), and that a plain, adequate and complete remedy may not be had at law (*Judicial Code* 267).

The statute as to adequate remedy "certainly means something; and if only declaratory of what

was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts.”

Cruickshank v. Bidwell, 176 U. S. 73, 81,
quoting *New York Guaranty Co. v.*
Memphis Water Co., 107 U. S. 205, 214.

If we assume, for the sake of argument, that Chapter 612 of the Laws of 1922 is violative of the Constitution of the United States, we submit that the complainant is not entitled to an injunction against the defendant Joab H. Banton, as District Attorney, etc., for the reason that he has a plain, adequate and complete remedy at law. In the event that any criminal proceedings are instituted against the complainant for his violation of the statute in question, he may test the constitutionality of the statute, either by suing out a writ of habeas corpus, or by setting up the unconstitutionality of the statute as a defense to the criminal proceedings; and if the State courts uphold the statute, the case may be brought to this Court by writ of error. The question is a simple one; namely, whether the statute is a valid exercise of the State's police power. This question can be tried and determined as easily and as fully in a criminal prosecution as in an equity suit. It is a question of law, pure and simple, and does not involve an inquiry into any questions of fact. It is wholly unlike an inquiry into the reasonableness of rates for a public service corporation that have been fixed by statute, which inquiry would involve complicated questions of fact.

As a matter of fact, the course suggested above has been followed in another case. In *People v. Martin* the defendant was convicted, in the Court of Special Sessions of the City of New York, of a violation of the statute. On appeal, the statute was held constitutional and the judgment of conviction was affirmed (203 N. Y. App. Div. 423; 235 N. Y. 550).

The case at bar is clearly distinguishable from the case of *Ex parte Young*, 209 U. S. 123. In the *Young* case it was held that the question of whether a State statute was unconstitutional because the penalties for its violation were so enormous that persons affected thereby were prevented from resorting to the courts for the purpose of determining the validity of the statute and were thereby denied the equal protection of the law, and their property rendered liable to be taken without due process of law, was a Federal question and gave the Circuit Court jurisdiction. It was further held in that case that no adequate remedy at law, sufficient to prevent a court of equity from acting, existed in a case where the enforcement of an unconstitutional State rate statute required the complainant to carry merchandise at confiscatory rates if it complied with the statute and subjected it to excessive penalties in case it did not comply therewith and its validity was finally sustained. In the course of its opinion in the *Young* case, the Court said, at pages 147, 148:

“Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the

case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event."

Chapter 612 of the Laws of 1922 relates to a subject over which the jurisdiction of the Legislature is complete in any event. The subject is the protection of life and limb of the people of the State of New York. The statute is not confiscatory and does not do irreparable injury to the persons affected thereby; and no injunction is necessary to safeguard property rights.

The bill of complaint alleges that the defendants have announced that they will prosecute the plaintiff and all persons similarly situated if the law is not complied with.

Since no answer has been interposed by the defendant, Joab H. Banton, but merely a motion to dismiss the bill of complaint, the allegations just quoted must, of course, for the purpose of this argument, be taken to be true.

The statute under consideration has not been construed in any reported decision in respect to the number of prosecutions which may be maintained against a given person for his failure to comply with the requirements of the statute. We think it probable, however, that the proper construction of the statute is that if a prosecution is instituted for a failure or refusal extending over a number of days, weeks or months, there can be a conviction only as for a single offense, but that if the owner of a taxicab, after conviction for a violation of the statute, wilfully persists in continuing to refuse to furnish the bond or other security required by the statute, the prior conviction will not bar any other prosecutions for subsequent wilful violations of the statute.

But we submit that it makes little difference in the case at bar whether the offense created by the statute is a continuing one, for which there can be only one prosecution, or whether each separate refusal is a separate and distinct offense, for which a separate and distinct prosecution will lie. No matter which construction of the statute is proper, there does not exist that danger of a multiplicity of prosecutions which would justify a court of equity in granting an injunction against the enforcement of the statute. In the case of a public service corporation whose rates are fixed by a penal statute, there is danger of a multiplic-

ity of prosecutions arising out of transactions between the corporation and innumerable persons—between the corporation and the public at large. In the case at bar the only danger to which the complainant is subjected is that of prosecution on account of its refusal to furnish a bond or security to a single entity, namely, the State of New York. The statute does not impose any specific duty upon the complainant in respect to individual members of the public.

Where a penal statute fixes the rates of a public service corporation, the corporation, if it is to continue in business, must either render service for the reduced statutory rates, which may be in fact confiscatory, or must demand higher rates in violation of the law and thereby run the risk of incurring penalties in innumerable cases, which, when accumulated, will amount to the taking of the corporation's property without due process of law (See *Ex parte Young*, 209 U. S. 123, 162).

The situation is entirely different in the case at bar. The statute makes a violation of its provisions a misdemeanor, but does not prescribe the punishment. The *New York Penal Law* (§1937) provides that the punishment for a misdemeanor, for which no other punishment is specially prescribed, is imprisonment for not more than one year or a fine of not more than \$500, or both such imprisonment and fine. The penal liability which the plaintiff in the case at bar would incur if he violated the statute under consideration is not *enormous* within the meaning of the rule laid down in *Ex parte Young* (209 U. S. 123).

In *Rast v. Van Deman* (240 U. S. 342), the Court passed upon the validity of a statute of the State of Florida requiring merchants in certain designated classes to pay prescribed license taxes and providing that any person violating any of the provisions of the statute should, on conviction, be punished by a fine not exceeding \$1,000, or by imprisonment in the county jail not exceeding six months. In the course of its opinion, the Court said (p. 368):

“The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex parte Young*, 209 U. S. 123, is not justified.”

The case at bar is clearly distinguishable from *Ex parte Young*. The situation in this case is analogous to that in *Rast v. Van Deman* (240 U. S. 342).

Another distinction between the case at bar and the *Young* case is that in this case the question of whether the statute is constitutional is merely one of law, namely, whether it is a valid exercise of the police power of the State of New York; whereas, in the *Young* case the validity of the statute depended upon the reasonableness of the rates fixed by the statute, and that question could not be tried out as fully and as fairly in a criminal prosecution as in an equitable proceeding.

In *Ex parte Young*, 209 U. S. 123, 164, 165, the Court said:

“It would not be wonderful if, under such circumstances, there would not be a crowd of

agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk.

“If, however, one should be found and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings, within the State from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answers could only be given after a careful and prolonged examination of the whole evidence, and the making of calculations based thereon. All material evidence having been taken upon these issues, it has been held that it ought to be referred to the most competent and reliable master to make all needed computations and to find therefrom the necessary facts upon which a judgment might be rendered that might be reviewed by this court. *Chicago &c. Railway Co. v. Tompkins*, 176 U. S. 167. From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that

the rates were too low and therefore the act invalid.

"We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis etc. Ry. Co. v. Gill*, 156 U. S. 649), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

In *Raich v. Truax*, 219 Fed. 273, 283, the Court said:

"We think the position taken by respondents that the institution of a criminal proceeding against the respondent Truax in the State Courts will afford ample means of determining judicially the rights of the complainant in the case at bar is untenable. The complainant is not a party to any such criminal proceedings, nor can he be made a party thereto; nor can he be heard therein, nor can he be in any legal sense secure, or require that his legal rights be determined therein. If he cannot secure his legal rights in a court of equity, he cannot secure them at all; for he is powerless to secure them in any legal proceedings that have been or can be instituted under this law, and he cannot secure them in any action at law for damages. It cannot be successfully contended that he has no legal rights. It is axiomatic that every man within the territorial jurisdiction is entitled to his day in court. This complainant can have no day in court, save in a Court of Equity."

In *Marcus Brown Holding Co. v. Feldman*, (269 Fed. Rep. 306, affirmed 256, 170), it was held that "though, ordinarily, equity will not enjoin prose-

cution for violation of statutes alleged to be unconstitutional, but will permit that defense to be interposed in a prosecution, it can issue such injunction to restrain prosecution under the *New York Housing Laws of 1920* (Laws 1920, c. 951), if they are invalid, since thereunder the landlord's agents and employes can be prosecuted for failure to furnish service to tenants, which would affect the landlord's property rights without his having an opportunity to be heard."

In the case at bar, the plaintiff is not in the position in which the plaintiff was in either the case of *Raich v. Truax*, or the case of *Marcus Brown Holding Co. v. Feldman*, as this plaintiff *would* be a party to a criminal prosecution instituted for his violation of the statute, and his property rights could not be affected without his having an opportunity to be heard. The penal provisions of the statute are applicable only to the owner of the motor vehicle. The statute imposes no duty upon the agents or servants of the owner and makes no provision for the punishment of such agents or servants.

We respectfully submit that the plaintiff in the case at bar has a plain, adequate and complete remedy at law and, therefore, is not entitled to injunctive relief.

POINT III.

Chapter 612 of the Laws of New York of 1922 is a valid exercise of the State's Police Power.

We shall not waste the time of the Court by indulging in a lengthy discussion of elementary principles. This Court is thoroughly familiar with the principles which it has laid down governing the determination of the question of whether the statute under consideration is a valid exercise of the State's police power. What we have to say shall be said briefly and without unnecessary elaboration.

It cannot be doubted that the Legislature of the State of New York has power to regulate the manner in which the business of operating motor vehicles to carry passengers for hire shall be conducted within the State. Reasonable regulations which are designed to protect the public safety, and which are adapted to that end, may be imposed.

Since the Legislature has power to regulate the business of operating taxicabs for hire, the only question to be determined is whether the statute under consideration constitutes a proper exercise of that power. The Appellant attacks the constitutionality of the statute on several grounds which we shall consider briefly.

Appellant asserts that the statute is unconstitutional both because it is violative of

the 14th Amendment of the Constitution of the United States, and because it is in contravention of Article 1, §6, of the Constitution of the State of New York.

We shall discuss the former contention only. Where a court is constituted under Section 266 of the *Judicial Code* for the purpose of hearing a suit for an injunction to restrain the enforcement of a state statute on the ground that the statute violates the Constitution of the United States, that question alone gives the court jurisdiction, and the court should not consider objections to the validity of the statute based on grounds not connected with the Federal question (see *Jackson v. Cravens*, 235 Fed. 212).

We may say at this point that the statute involved in the case at bar has been held constitutional by the courts of the State of New York.

People v. Martin, 203 N. Y. App. Div. 423, affirmed without opinion, 235 N. Y. 550.

(a) *Equal protection of the law.*

The appellant contends that the statute violates the Fourteenth Amendment to the Federal Constitution in that it denies him the equal protection of the law. The basis of this contention is that the statute singles out persons, firms, associations and corporations engaged in the business of carrying and transporting passengers for hire in motor vehicles on or in public streets in certain cities of the State, and exempts from the operation of the statute owners of cars using the same

as common carriers of goods, and owners of pleasure vehicles and of auto trucks, and also exempts from its operation street cars and motor vehicles operated by corporations under the supervision of the Public Service Commission of the State of New York. In other words, it is contended, in substance, that the Legislature has made a classification which is so arbitrary and unreasonable as to render the statute repugnant to the equal protection clause of the Fourteenth Amendment.

It seems to us that this contention is wholly without merit. The Legislature, when regulating the conduct of a business in the exercise of its police power, has a wide discretion in respect to the selection and classification of the business to be regulated. In the absence of a clear showing to the contrary, it must be assumed that the Legislature, in adopting the particular classification, had information in its possession which justified the action taken. Where the classification operates equally upon all persons coming within the class selected, the courts are extremely reluctant to substitute their judgment for that of the Legislature as to the wisdom or justice of the classification.

We may assume, for the purpose of this argument, that when the Legislature was considering the enactment of the statute involved in this case, it had convincing information of the existence of facts rendering it necessary and desirable to require the owners of taxicabs to give proper security to insure the payment of judgments which might be recovered against them for personal injuries—as, for example, that many taxicabs are

owned and operated by persons who are financially irresponsible; that there are many outstanding judgments rendered against taxicab owners which are uncollectible; that many taxicabs are being operated in a reckless manner and without due regard to the safety either of the passengers or of other persons using the streets; that the competition for business is so keen that the natural tendency is for a taxicab chauffeur to operate his machine in such a manner that unnecessary risks are taken and will continue to be taken, unless legislative restrictions are imposed which will bring taxicab owners to a sense of their responsibility to the public for the negligent operation of the taxicabs; and that the number of deaths and other injuries caused by the operation of taxicabs is very much greater proportionately than the number of deaths and injuries caused by the operation of other motor vehicles.

If the Legislature did have such facts or such information in its possession, it surely had abundant justification for enacting the statute under consideration. The owners of taxicabs should surely be required to place themselves in a position where they are able to respond in damages for injuries caused by their vehicles. The requirement that they should be able to respond in the sum of \$2,500 in any given case is a most reasonable one.

This Court has laid down the following rules for testing the contention that a State statute is arbitrary in its classification and consequently denies the equal protection of the law to those whom it affects:

"The rules by which this contention must be tested, as is shown by repeated decisions of this Court, are these:

"(1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is arbitrary.

"(2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"(3) When the classification in such a law is called in question, if any state of facts can reasonably be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"(4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Lindley v. National Carbonic Gas Co.,
220 U. S. 61, 78, 79, *affirming* 170 Fed.
Rep. 1023.

"A State may classify with reference to the evil to be prevented, and * * * if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have

shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named."

Patson v. Pennsylvania, 232 U. S. 138, 144.

The State may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses. When a statute has been passed for the purpose of correcting a particular evil, the courts are very slow to declare that the Legislature was wrong in the facts upon which it acted in passing the statute.

Patson v. Pennsylvania, 232 U. S. 138, 144.

Tested by the foregoing rules, it seems to be clear that §282-b of the New York Highway Law (Laws of 1922, c. 612) does not deny the defendant-appellant the equal protection of the law.

(b) *Limitation to Cities of the First Class.*

The statute is not rendered invalid by the fact that it is by its terms applicable only to the operation of taxicabs in cities of the first class.

It is well settled that the equality contemplated by the Fourteenth Amendment does not include a territorial equality, and that legislation which, though limited in the sphere of its operation, affects alike all persons similarly situated within such sphere, is valid.

Barbier v. Connolly, 113 U. S. 27, 32;

Hayes v. Missouri, 120 U. S. 68;
Tenement House Dept. v. Moeschen, 175
 N. Y. 325, Affirmed without opinion in
 203 U. S. 583;
People ex rel. Armstrong v. Warden, 183
 N. Y. 223, 226;
Williams v. People, 24 N. Y. 405;
Matter of Morgan, 114 N. Y. App. Div.
 45, 54;
Burnham v. Acton, 35 How. Pr. (N. Y.)
 48.

In *Hayes v. Missouri*, 120 U. S. 68-71, this Court said *per Mr. Justice Field*:—

“The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privilege conferred and in the liabilities imposed.”

In *People ex rel. Armstrong v. Warden*, 183 N. Y. 223, 226, the Court said:—

“Criminal laws are not necessarily unconstitutional even though they bear unequally upon persons in different parts of the state. The evil which the legislature may have in view in passing such laws may exist only in the great cities of the state, and have no existence in rural districts.”

There may be reasons for a taxicab bonding law in large cities which do not apply elsewhere; and

of that the legislature is the best, and practically the final, arbiter.

Certainly it is a matter of common knowledge that the traffic problem in New York City, for example, is a much more serious and complicated one than is the problem in smaller and less congested communities in other parts of the State of New York.

(c) *Due Process of Law.*

The Appellant contends that the statute violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

It is argued that the record in this case shows that the net result of the legislation under consideration is "to benefit the large owners of taxicab companies operating many cars, and insurance companies to the detriment of the complainant and all other persons similarly situated"; that the premium demanded of the taxicab men is \$960. per year; that Appellant's earnings are about \$1820. per year; and that in this manner Appellant "is deprived of his earnings to the extent of \$960. a year, which is a virtual confiscation of his earnings."

A complete answer to the Appellant's argument in this respect may be found in the opinion of the Court in *People v. Martin*, 203 N. Y. App. Div. 423, wherein the Court said at pages 429-430:

"The fact that the exercise of the police power of the State, or the passage of remedial statutes in the public interest, may entail expense upon the owner of property, even

though it may amount to more than he thinks he can temporarily stand, still is no answer to the validity of the law. The question was sharply presented in the Tenement House cases (*Health Department v. Rector, etc.*, 145 N. Y. 32; *Tenement House Department v. Moeschén*, 179 id. 325; *affd.*, 203 U. S. 583), and the right to pass proper statutes upheld, even if compliance therewith be expensive."

Furthermore, the Appellant's argument in respect to the deprivation of his property without due process is based upon the assumption that it will cost him \$960.00 to comply with the requirements of the statute. As we have shown in Point I of this brief, it might be possible for the Appellant to comply with the law at a much smaller cost than \$960.00 per year. It is not the fact that it would cost him \$960.00 to give a corporate surety bond, as such a bond may be obtained at a cost of from \$5 to \$25 per month (Tr. 23, 24); and the law permits the Appellant to obtain a policy of insurance as an alternative to a corporate surety bond, and the record shows that \$540 is the annual cost of obtaining such a policy of insurance (Tr. 27).

It is clearly within the power of the legislature to protect persons using the city Streets by requiring owners of taxicabs to take suitable steps to meet claims for damages for personal injuries caused by the operation of the taxicabs. The Legislature may do this even though compliance with the law will put taxicab owners to considerable expense. It is true that the rates of fares which taxicabs charge are fixed by law; but the statute under consideration does not in any way

regulate, or purport to regulate, the rates of fare. If the cost of complying with this statute is so great as to make it just and equitable that higher rates of fare be permitted, taxicab owners have their recourse by applying to the proper authorities for permission to increase their rates.

The rule is well settled that the inhibition upon the deprivation of liberty or property without due process of law is not violated by the legitimate exercise of legislative power to secure the public safety. The statute under consideration is not an arbitrary interference with the rights of the individual, but is a fair, reasonable and appropriate exercise of the police power. The object sought is the preservation of public safety and the welfare of the community; and the regulations imposed are reasonable and appropriate.

McIntosh v. Johnson, 211 N. Y. 265-268;
City of Rochester v. West, 164 N. Y. 410.

“Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use; but simply regulate its use and enjoyment by the owner. If he suffer injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.”

Health Department v. Rector, etc., 145
 N. Y., 32-43.

See also

Matter of Viemeister, 179 N. Y. 235-238;
People ex rel. Nechamcus v. Warden, 144
 N. Y. 529.

POINT IV.

Similar statutes have been held valid in jurisdictions other than New York.

Statutes and ordinances substantially similar to the New York statute have been upheld in a number of other jurisdictions, as will be seen by the citations hereinafter set out.

Arkansas:

In *Willis v. City of Fort Smith* (121 Ark. 606; 182 S. W. 275), it was held that a municipal ordinance regulating jitney busses and requiring the filing of a bond in the penal sum of \$2,500 for each jitney was not invalid as discriminatory class legislation or as denying equal protection of the laws.

California:

In *Ex parte Cardinal* (170 Cal. 519; 150 Pac. 348; L. R. A. 1915 F. 850), it was held that a city ordinance regulating jitney busses and providing that the owner must give a bond or furnish a policy of insurance in the sum of \$10,000 was reasonable and that the ordinance was valid. The court also held that the ordinance was not ren-

dered invalid by a provision requiring the bond to be that of a surety company. It will be observed that the New York statute is more liberal than the ordinance construed in the *Cardinal* case, in that it permits the giving of a bond with personal sureties as well as a bond with corporate surety.

In the *Cardinal* case the Court said (150 Pac., pp. 348-349):

“The first substantial objection made to the ordinance is that no proper basis can be found for an attempt to specially regulate the use of the kind of vehicle defined as a jitney bus; that the attempt here to regulate the use of the jitney bus in the manner prescribed, without including all other motor vehicles used on the streets, and especially those used for the carriage of passengers, is a discrimination against the so-called jitney bus that is not warranted under the constitution. It cannot successfully be disputed that the city and county of San Francisco has the right, in the exercise of its police power, to enact such reasonable regulations for the safety of the public as are not in conflict with general laws, to regulate the use of vehicles on its public streets. While in doing this it may not arbitrarily discriminate against any species of vehicle, it may classify vehicles for the purpose of regulation in such manner as is reasonable, in view of the character and manner of use and the danger to the public to be apprehended, and such classification must be upheld by the courts unless it is manifestly unreasonable or arbitrary. No reasonable person will dispute the proposition, that in view of many circumstances peculiar to automobiles and their use, regulations specially applicable thereto will be sustained. And it is manifest that as to automobiles

there may be circumstances existing, by reason of the manner and character of their use on the streets, that will warrant, in the interest of the safety of the public, special regulations as to those used for a particular purpose and in a particular way. The only limitation in the matter of any such classification is that the same must be reasonable—that there is some difference between the vehicles embraced in the class attempted to be created, and other vehicles, that bears a proper relation to the regulations prescribed for those coming within the class. If the classification is reasonable, including all that may fairly be said to be similarly situated and affecting alike all of those, there is no forbidden discrimination. The question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements, the presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination unless they can plainly see that the same was without warrant in the facts. This is but a statement of well-settled doctrines applicable in considering such questions as the one before us.”

Georgia:

In *Hazleton v. City of Atlanta* (144 Ga. 775; 87 S. E. 1043; 93 S. E. 202), it was held that a city ordinance regulating the licensing and operation of jitney busses and requiring the giving of an indemnity bond in the sum of \$5,000 for each vehicle so operated was valid, and that the ordinance was not discriminatory against persons engaged in the business of operating such vehicles and in

favor of other persons operating taxicabs and like vehicles.

Iowa:

In *Huston v. City of Des Moines* (176 Iowa 455; 156 N. W. 883), the Court upheld the validity of a municipal ordinance which, among other things, required operators of jitney busses to furnish indemnity bonds in the sum of \$2,000 for the protection of the public and passengers. The ordinance had been passed pursuant to power conferred by a State statute authorizing municipalities to regulate jitney busses. The court held that the statute was not invalid as class legislation or as taking property without due process of law, and that the ordinance was not invalid as requiring a bond in a prohibitive amount. In that case, one of the contentions was that the ordinance was discriminatory because it did not apply to taxicabs; but the court brushed that contention aside as having no merit.

Louisiana:

In *City of New Orleans v. Le Blanc* (139 La. 113; 71 So. 248), the validity of an ordinance which had been adopted by the City of New Orleans was upheld. The ordinance provided, among other things, for the filing of an indemnity bond in the sum of \$5,000, and further provided that in the event the amount of the bond should be reduced by the payment of damages for injuries inflicted, an additional bond should be furnished "so that, at all times, a bond, or bonds, of indemnity for the entire sum of \$5,000 shall be carried, on each

and every vehicle used, employed and operated in the business aforesaid”.

In *Lutz v. City of New Orleans* (235 Fed. 978), the United States District Court for the Eastern District of Louisiana upheld the validity of the same ordinance, holding that it did not deny equal protection of the laws, was not confiscatory, and did not deny liberty of contract.

In one respect the ordinance of the City of New Orleans is more burdensome than the New York statute in its provisions. The ordinance requires that the bond shall be executed by a surety company or companies duly authorized to do business in the State of Louisiana, whereas our statute permits the giving of a bond with personal sureties.

Massachusetts:

In *Com. v. Slocum* (230 Mass. 180; 119 N. E. 687), the Court upheld a city ordinance requiring the giving of a bond for \$1,000 for each motor vehicle used in the transportation of passengers for hire.

And in *Com. v. Theberge* (231 Mass. 386; 121 N. E. 30), the validity of a similar ordinance requiring a bond of \$2,500 was upheld.

Michigan:

In *Melconian v. City of Grand Rapids*, 188 N. W. 521, the Supreme Court of Michigan upheld the validity of an ordinance requiring the furnishing of an indemnity bond in the sum of \$5,000.

Nevada:

In *Ex parte Counts* (39 Nev. 61; 153 Pac. 93), it was held that a city ordinance was valid which required the giving of a surety company bond or policy of insurance in the sum of \$10,000 for the operation of not to exceed one jitney bus and \$5,000 for each additional jitney bus.

New Jersey:

In *West v. City of Asbury Park* (89 N. J. L. 402; 99 Atl. 190), the Court upheld the validity of a statute, and of a municipal ordinance enacted thereunder, requiring the owner of a jitney to file an insurance policy in the sum of \$5,000.

See also

Gillard v. Mfgs.' Casualty Ins. Co., 92 N. J. L. 141; 104 Atl. 707.

Tennessee:

In *City of Memphis v. State ex rel. Ryals* (133 Tenn. 83; 179 S. W. 631; L. R. A. 1916 B. 151), the Court upheld a statute regulating the operation of jitney busses and requiring, among other things, the execution of a bond in the sum of \$5,000 for each car operated. It was held that the statute did not violate the due process clause of either the Federal or the state constitution, and that it did not make an unreasonable classification by discriminating between jitney busses and street railroad cars.

The same statute was construed and upheld in *Nolan v. Reichman* (225 Fed. 812) by three Fed-

eral judges sitting in the District Court for the Western District of Tennessee under the provision of §266 of the Judicial Code.

Texas:

In *Ex parte Sullivan* (Tex. Crim. App., 178 S. W. 537), the court held that an ordinance of the city of Fort Worth regulating the operation of jitney busses was valid. The ordinance construed in that case provided, among other things, that no motor bus could be operated until the owner or licensee had taken out an insurance policy to indemnify his legal liability in the sum of \$5,000 to any one person other than a passenger, and \$10,000 for any single accident where more than one person other than a passenger was injured or killed. The ordinance also provided that if in any event the said policy of insurance should for any reason be cancelled or retired, it should be unlawful to continue the operation of the motor bus until another such bond should have been filed.

In *Auto Transit Co. v. City of Fort Worth* (Tex. Civ. App., 182 S. W. 685), the same ordinance was again upheld. The court, after overruling contentions that the ordinance was discriminatory and denied due process of law, held further that the fact that persons operating jitneys were not in a position to comply with the requirement for a bond and would therefore be compelled to abandon the operation of their motor busses did not, of itself, establish the unreasonableness or invalidity of the ordinance.

In *Greene v. City of San Antonio* (Tex. Civ. App., 178 S. W. 6), the validity of a city ordinance

requiring the giving of an indemnity bond by one conducting a jitney business was upheld. The reported opinion does not set out the terms of the statute or indicate just what bond was required by the ordinance.

In *Craddock v. City of San Antonio* (Tex. Civ. App., 198 S. W. 634), another ordinance of the same city regulating the operation of automobiles used for hire, other than jitneys, and apparently requiring the giving of an indemnity bond, was likewise held to be constitutional. But the opinion in that case does not show what bond was required by the ordinance.

See also, *Ex parte Parr* (82 Tex. Crim. 525; 200 S. W. 404), wherein the court upheld still another ordinance of the City of San Antonio licensing the operation of automobiles for hire and requiring that an operator should furnish a bond or indemnity insurance in the sum of \$10,000 against injuries to persons or property through the negligent operation of the automobile.

In the *Parr* case, the court took the view that it was not an improper classification to provide in one ordinance for the licensing of jitneys operating over particular routes and in another ordinance for the licensing of cars for hire confined to no particular route. It was also held that where a city has authority to pass reasonable regulations governing automobiles operating on its streets for hire, the court would not be authorized to declare the regulations unreasonable unless it clearly appeared that they were so.

In *Ex parte Bogle* (Tex. Crim. App., 179 S. W. 1193), an ordinance of the City of Austin was up-

held. The ordinance required the owner operating a jitney to file an indemnity bond of \$5,000, conditioned that he should pay any judgment rendered against him to the extent of \$2,500 for injury to or death to any person and to the extent of \$5,000 for like injuries in one accident to more than one person.

In *City of Dallas v. Gill* (Tex. Civ. App., 199 S. W. 1144), an ordinance regulating and licensing jitney busses and requiring a surety bond by the operators was held to be valid. The reported opinion does not disclose the precise terms of the ordinance with respect to the bond required.

Washington:

A statute of the State of Washington regulating the operation of motor vehicles engaged in the business of transporting passengers for hire and requiring a bond in the penal sum of \$2,500 with a surety company licensed to do business within the state as surety has been construed in several cases, and in each case held to be valid.

In *State v. Seattle Taxicab and Transfer Co.* (90 Wash. 416; 156 Pac. 837), it was held that the statute was not unconstitutional as taking property without due process of law or as discriminating in favor of street railway companies. And it was also held that the statute was not rendered invalid by the fact that it required a surety company bond, with no provision for any other bond.

The case just cited was followed and approved in *State v. Ferry Line Auto Bus Co.* (93 Wash. 614; 161 Pac. 467).

In *Hadfield v. Lundin* (98 Wash. 657; 168 Pac. 516, Ann. Cas. 1918, C. 492), the court reconsidered the question of the validity of the statute, and after full reconsideration reaffirmed its validity.

West Virginia:

In *Ex parte Dickey* (76 W. Va. 576; 85 S. E. 781), a city ordinance regulating jitney busses was held to be valid. The ordinance required a bond in the sum of \$5,000. One of the objections raised to the ordinance was that it discriminated in favor of other distinct classes of vehicles kept for hire.

In two jurisdictions ordinances of this character have been held invalid.

In *Jitney Bus Association of Wilkes-Barre v. City of Wilkes-Barre* (256 Pa. St. 462; 100 Atl. 954), the court construed an ordinance which had been adopted by the City of Wilkes-Barre. In that case, the Jitney Bus Association filed a bill to enjoin the enforcement of the ordinance. The Court of Common Pleas dismissed the bill, and plaintiff appealed. The Supreme Court of Pennsylvania modified and affirmed the decree of the lower court. The ordinance construed in that case made it unlawful for any person to drive or operate a jitney automobile unless he had filed with the City Council, either a bond in the sum of \$2,500, or a policy of insurance. As to the bond, it was provided that "said bond shall be a continuing liability, notwithstanding any recovery thereon." As to the policy of insurance, it was provided that "said policy of insurance * * * be in limits of five thousand dollars (\$5,000) for any one person injured or killed, and subject to such limits for each

person, a total of ten thousand dollars (\$10,000) in the case of any one accident resulting in bodily injury or death to more than one person." The ordinance did not provide, as is provided in the New York statute, for the alternative of giving a personal bond.

The Supreme Court of Pennsylvania held that the exclusion of personal sureties was not justifiable or reasonable; and also held that if the provision for a continuing liability meant that after recovery of the penal sum of \$2,500 the obligors should continue to be liable for other and additional amounts without limit, then the requirement was clearly unreasonable, as "no surety could properly be asked to undertake such an indefinite and unlimited responsibility." The Court, therefore, modified the decree dismissing the bill by striking from the terms of the ordinance the requirement restricting the surety upon the bonds to surety companies and the requirement that "the bonds shall be a continuing liability, notwithstanding recovery thereon"; and as thus modified affirmed the decree dismissing the bill. In all respects the ordinance was held to be valid except in the particulars just pointed out; and the court expressly recognized the right of the municipality to regulate, in the interest of the public safety, the running of jitneys as well as all other traffic upon the public streets.

It will be observed that there is an important distinction between the statute under consideration and the ordinance which was construed in *Jitney Bus Association v. City of Wilkes-Barre*. The Wilkes-Barre ordinance did not give the op-

erator of the motor vehicle the alternative of furnishing a bond with personal surety, whereas the New York statute provides that the operator may furnish "either a personal bond, with at least two sureties approved by the State Tax Commission," or "a corporate surety bond." It is true that the Pennsylvania court condemned the provision of a continuing liability under the bond, but it gave as its reason for so doing that "no surety could properly be asked to undertake such an indefinite and unlimited responsibility."

In the case at bar it is not contended that the provision of the statute for a bond with a continuing liability is invalid.

The New York Statute permits the owner to file a policy of insurance as an alternative for giving either a personal or corporate bond; and the testimony in the case (Tr. 27) shows clearly that certain insurance companies are prepared to issue unlimited policies of liability insurance. So that even if it be conceded for the sake of argument that the appellant in the case at bar could not secure a bond, it is clear that he had facilities for complying with the law by giving the policy of insurance which the statute says would satisfy its requirements.

In *State ex rel. Stephenson v. Dillon* (Fla. 1921; 89 So. Rep. 558), the Supreme Court of Florida construed an ordinance of the City of Miami entitled "An ordinance regulating jitney busses." In that case a person who was held in custody by the police under a charge of violating the ordinance by operating a jitney bus without a license, sued out a writ of *habeas corpus*. It ap-

peared that the charter of the city authorized it to enact ordinances for the licensing and regulation of motor busses, jitney busses and other vehicles, and "to pass all ordinances necessary to the health, convenience, comfort, and safety of the citizens". The court held on the authority of *Jitney Bus Assn. v. Wilkes-Barre* that an ordinance which requires owners or operators of jitney busses to enter into a bond in the penal sum of \$5,000 and which provides that such bond "shall contain a provision that there is a continuing liability thereunder of not less than the full amount thereof * * * notwithstanding any recovery thereon", is an unreasonable requirement and not within the scope of the authority conferred by the city charter. The Miami ordinance provided for either a bond or a policy. It is not clear from the reported opinion whether the operator of a jitney bus had the option under the ordinance of giving a bond with personal surety.

The Pennsylvania and Florida decisions are opposed to the overwhelming weight of authority, and seem to us to be unsound in principle.

We respectfully submit that Chap. 612 of the Laws of 1922—§282-b of the Highway Law—is in every respect valid. The classification adopted by the Legislature was one which it had the power to make. The Legislature had the right to limit the statute to taxicabs carrying passengers for hire, and to limit it to those taxicabs operating in cities of the first class. The provisions for a bond or policy of insurance are reasonable and proper; and the statute is a valid exercise of the State's police power to protect the life and limb of its citizens.

Conclusion.

We feel that we cannot conclude this brief in any better way than by giving the following quotation from the opinion of Chief Judge Hiscock of the New York Court of Appeals in *Matter of Stubbe v. Adamson*, 220 N. Y. 459, 469, 670, which seems to us to summarize fairly the views not only of that Court, but also of this Court:

“The Legislature is justified in guarding against evils both real and fairly to be anticipated by any legislation which reasonably tends to prevent them, and it has a wide discretion in formulating the means which shall be adopted to this end. It is a sufficient basis for legislative action if only there are reasonable grounds for belief that the evil may occur, and even though there be ‘an earnest conflict of serious opinion on the subject.’

There must be a real evil, reasonably to be anticipated and to be guarded against, and if it appears from the face of the statute interpreted in the light of common knowledge that there is no evil or that there is no reasonable relation between the evil and the proposed remedy, or that the latter is unduly oppressive and confiscatory, the courts may pronounce the legislation unconstitutional and restrain its enforcement (*People v. Charles Schweinler Press*, 214 N. Y. 395, 406, 407).

But if these facts do not appear upon the face of the statute we are bound to assume that the legislature has investigated the subject concerning which it is legislating and has acted with reason and not from caprice. We must start out with the presumption that

the legislation is constitutional and valid, and however the courts may doubt the wisdom of an enactment they cannot pronounce the same unconstitutional unless able to see either that there is no real, substantial evil of public interest to be guarded against, or that there is no reasonable relation between the evil and the purported cure or prevention offered by the statute (*People v. Griswold*, 213 N. Y. 92, 97; *People v. Charles Schweinler Press*, *supra*)."

The statute under consideration is a constitutional one. The decree of the District Court denying an injunction and dismissing the bill for want of equity was proper and should be affirmed.

Respectfully submitted,

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Dated, New York City, November, 1923.